Response ID ANON-GSVF-1GQU-M

Submitted to Administrative Review Reform Issues Paper
Submitted on 2023-04-30 13:20:19

Questions about you

What is your name?

Name:
Dr Jason Donnelly

What is your email address?

Email:
j.donnelly@westernsydney.edu.au

Who are you making this submission for?

Myself

What is your organisation?

Organisation:
N/A

What best describes your engagement with the AAT?

Other/Prefer not to say

Other (please specify):
Academic (Senior Lecturer at Western Sydney University, School of Law), Author (Federal Administrative Law with Thomson Reuters) and Barrister-at-Law (Sydney Bar)

What state or territory are you from?

NSW

Making your submission public

I agree to my submission being made public under my/my organisation's name

Design

What are the most important principles that should guide the approach to a new federal administrative review body?

Response:

1. The administration of justice that facilitates the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible.

Should the new federal administrative review body have different, broader or additional objectives from those of the current AAT? If so, what should they be?

Yes

Please expand on your response:

1. Facilitate the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible (the overarching purpose).

2. The overarching purpose should include the following objectives:

(a) the just determination of all proceedings before the new body;

(b) the efficient use of the administrative resources available for the purposes of the new body;

(c) the efficient disposal of the new body's overall caseload;

(d) the disposal of all proceedings in a timely manner;

(e) the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute.

Should the Administrative Review Council (ARC), or a similar body, be established in the new legislation? What should be its functions and membership?

Yes

Please expand on your response:

1. The Administrative Review Council (the ARC) should be reinstated and constituted in accordance with Part V of the Administrative Appeals Tribunal Act 1975 (Cth) (the AAT Act).

2. The submitter gracefully adopts the written submission previously advanced by the Law Council of Australia on the resurrection of the ARC: 'Not only would that be consistent with the rule of law given the terms of the AAT Act require it to exist and operate, but it would serve a great deal of good for Australia's administrative law system'.

How should the legislation creating the new body encourage or require government agencies to improve administrative decision-making in response to issues identified in decisions of the new federal administrative review body?

Enter your response here:

1. First, a mandatory parliamentary tabling obligation of Commonwealth government agencies to publish before each House of the Parliament an annual report on the extent to which those agencies are meeting predetermined benchmarks.

2. Second, a statutory obligation requiring government agencies (i.e. employees etc) to undertake at least twenty hours a year of mandatory continuing education concerning Commonwealth administrative law.

Structure

What structure would best support an efficient and effective administrative review body?

Enter your response here:

1. The current structure of 9 divisions and 5 division heads should be reduced.

2. The Immigration Assessment Authority (the IAA) should be subsumed within the Migration and Refugee Division (the MRD).

3. The FOI Division and Veterans' Appeals Division should be subsumed within the General Division.

4. The Small Business Tax Division and the Tax and Commercial Division should be merged into a new division titled the 'Commercial and Tax Division'.

5. The NDIS Division and the Social Services and Child Support Division should be merged into a new division titled 'the Community Division'.

How flexible should the new body be in assigning members across the full spectrum of matters in the new body, and who should have the ability to assign or reassign members?

Enter your response here:

1. There should be considerable flexibility in assigning members across the full spectrum of matters in the new body. It is to be recalled that the judges of the Federal Court of Australia are required to determine matters across a broad range of subject matters.

2. Both the President of the new body and the Commonwealth Attorney-General should have the power to assign or reassign members.

How can the legislation best provide for or support the application of different procedures for specific categories of matters?

Enter your response here:

1. The legislation should give power to the President of the new body to publish Practice Directions that are binding on users.

2. The legislation should make clear that the Practice Directions are to be developed in consultation with division heads.

Should the requirement that the President be a Federal Court judge be retained?

No

Response:

1. There should be a modification.

2. The President of the new body should either be a current or former Federal Court / Supreme Court judge.

Should the new body have other judicial members and what should their role be?

Yes

Please expand on your response:

1. Deputy Presidents should also be judicial members. Deputy Presidents, as heads of the relevant division, assume an important leadership / seniority role in their professional capacity.

Senior leadership

What should be the role and functions of the President (or equivalent) of the new body? What qualifications and skills should be required?

Enter your response here:

1. The President should largely have an administrative role to ensure the new body is meeting the statutory objectives of the legislation.

2. The President should also sit in very complex cases at his or her discretion. Appeals from such decisions of the President should be to the Full Court of the Federal Court of Australia.

3. The President must hold an Australian legal qualification and be either a current or former Federal Court / Supreme Court judge.

What should be the role and functions of the administrative head(s) of the new body? For example, should there be a separate Principal Registrar and CEO?

Enter your response here:

1. There should not be a separate Principal Registrar and CEO.

2. The functions of the Principal Registrar and CEO should be subsumed by the President and appointed heads of the respective divisions (who can delegate such functions to statutory members as required).

3. The President and division heads should be duly supported by sufficient administrative staff to discharge those important roles.

What is the appropriate split of responsibilities and powers between these roles?

Enter your response here:

1. Naturally, the President should wield considerable power to lead the new body. Such power should include, inter alia, as follows:

a. Publication of Practice Notes;

b. Assignment of statutory members to relevant divisions of the Tribunal;

c. Addressing serious complaints made in relation to the conduct statutory members;

d. Holding a de facto role, from time-to-time, as a member of an independent statutory body to recommend the appointment of new statutory members to the new body;

e. Meeting with relevant stakeholders to improve the administration of the new body.

2. The heads of the division should have, inter alia, the following powers:

a. Advising the President on the publication of new Practice Notes;

b. Supervising, to the extent necessary, statutory members of the relevant division;

c. Providing a leadership role as the head of the relevant division;

d. Where necessary, discharging important duties as so delegated by the President.

Below the President (or equivalent), what should be the most senior level of membership in the new body and what should their primary responsibility be?

Enter your response here:

1. All heads of a division should be a duly appointed Deputy President.

2. The Deputy Presidents should have primary responsibility for the following matters:

a. Hearing complex proceedings;

b. Considering applications for a proceeding to be determined by more than one statutory member;

c. Liaising with the President for the publication of new Practice Notes;

d. Supervising, to the extent necessary, statutory members of the relevant division;

e. Providing a leadership role as the head of the relevant division;

f. Where necessary, discharging important duties as so delegated by the President.

What aspects of leadership, management and administration should sit with the most senior levels of membership in the new body, and which should sit with APS leadership of the new body?

Enter your response here:

1. Appointment of administrative staff should sit with APS leadership.

2. General matters of human resources should sit with the APS.

3. The general functions of the President and Deputy Presidents have been addressed earlier in these submissions.

Members

What should be the levels of membership in the new body, and what should be the roles, responsibilities and qualifications required at each level?

Enter your response here:

1. General Member - hear the majority of cases.

2. Senior Member - hear more complex cases and assist Division Head(s) if required.

3. Division Head - provide leadership for members in their division (including jurisdictional, development and pastoral issues) and assists the Senior Leadership in running the new body.

Should all members be required to be legally qualified to be eligible for appointment?

Yes

Please expand on your response:

1. In Australia a person cannot provide legal services unless they are an Australian legal practitioner. There are powerful reasons for such a requirement. Provision of legal services without being an Australian legal practitioner is a criminal offence.

2. Members are required to administer the law. In that context, members undertake a similar role to Australian legal practitioners. Given that context, it is paramount that all members must be legally qualified.

3. Commonwealth law in Australia has become complex, difficult, and intricate. Legally qualified persons, professionally trained, are best suited to develop Australian public law.

What is the value of members holding specific expertise relevant to the matters they determine? Should the new body set particular criteria for subject-matter expertise (alongside more general qualifications)?

Yes

Please expand on your response:

1. Subject matter experts provide leadership in the development and administration of the relevant jurisprudence in their area. In my opinion, Division Heads and Senior Members should hold specific expertise in relevant divisions in which they operate.

2. More general legal qualifications is suitable for general members who do not necessarily hold subject-matter expertise

Should the new body have the ability to appoint experts to assist in a matter? If so, in what circumstances should this occur and what should be their roles?

Yes

Please expand on your response:

1. As a general rule, parties to proceedings should adduce expert evidence in support of their case.

2. Despite the preceding, members should also have the power to appoint experts to assist in discharging the important objectives of the new body.

Is there value in having members who are available to hear matters on an ad hoc basis (sessional members)? What role should they play?

Yes

Please expand on your response:

1. Sessional members should be used at the discretion of the President and Deputy Presidents of the new body.

2. The primary function of sessional members should be to address a backlog of cases in a given division.

Appointments and reappointments

Should the requirement for a transparent and merit-based selection process for members, including the Senior Leadership of the body, be incorporated in legislation? What elements should be included?

Yes

Please expand on your response:

1. The legislation should create an independent merit-based body to recommend the appointment of members to the new body.

2. The legislation should mandate that the new body is comprised of the following members:

a. President of the Tribunal.

b. President / Vice-President of an Australian based bar association.

c. President / Vice-President of an Australian based solicitor association.

d. A Professor of an Australian university.

e. A senior member of the public service.

f. A judge or former judge of the Federal Court of Australia / Supreme Court.

Should the legislation require the Minister to consult the President before appointing or reappointing members?

No

Please expand on your response:

1. No Cabinet Minister should have the power to appoint statutory members beside the Commonwealth Attorney-General.

2. As stated earlier in these submissions, an independent statutory merit-based body should be created to undertake that important continuing role.

What guidelines or procedures (similar to the present Guidelines for appointing members to the AAT) would support a transparent and merit-based appointment process?

Enter your response here:

1. An annual registry should invite applications for appointment as a member of the statutory body.

2. Applicants should address criteria along the following terms:

a. the applicant is an admitted lawyer;

b. the applicant was admitted as a lawyer at least five years ago;

c. ability to conduct hearings and other Tribunal proceedings;

d. decision-making and reasoning;

e. writing and communication skills;

f. independence, integrity and collegiality;

g. productivity, diligence and resilience; and

h. an understanding of, and a commitment to, safe and respectful workplaces.

What is the appropriate term of appointment for members, the President and the Registrar (or equivalent)?

3 years or less

Yes

No

Please expand on your response:

1. Senior Members and Members should be appointed for a fixed term of three years. This will allow underperforming members not to remain on the new body for a longer period.

2. Although reappointment is possible, members will need to demonstrate that they are publishing legally defensible decisions and otherwise continuing to meet the criteria for subsequent reappointment.

3. Deputy Presidents should be appointed for a fixed term of seven years.

3. The number of reappointments should be at the discretion of the President and the newly created merit-based body (depending on the needs of the new body).

What should be the process and criteria for reappointment of members? How should past performance be assessed to inform reappointment or appointment at a higher level?

Enter your response here:

1. Appointed members should be required to demonstrate how they are continuing to meet the criteria which led to their original appointment.

2. In assessing reappointment, the appointment body would also have regard to the following matters:

a. how many decisions of the member have been overturned on appeal;

b. the reasons why the member's decision was overturned on appeal;

c. any formal complaints made about the member and the outcome; and

d. any further academic and professional experience of the member post appointment period.

How can the current legislative requirements and processes for managing conflicts of interest, actual or perceived, be enhanced for the new body?

Enter your response here:

1. The submitter endorses the process of introducing a declaration process for new members and an annual declaration process for existing members relating to these and other relevant obligations.

2. The President of the new body should also be required to inform the Commonwealth Attorney-General of a failure to disclose a conflict of interest and to allow consideration of whether their appointment should be terminated.

3. An appointed member should be prohibited from appearing as an advocate, representative or expert witness before the new body while serving as a member.

4. Upon conclusion of the member's statutory appointment, the relevant person should be prohibited from appearing before the new body as an advocate for a period of 12 months.

What interests or outside employment of a member could give rise to an actual or perceived conflict of interest in a matter and what consequences for the member should follow from such a conflict?

Enter your response here:

1. An actual or perceived conflict of interest is most likely to arise where a member has an interest or outside employment in a particular subject matter that is also undertaken in the person's capacity as a member of the decision-making body.

2. Where there is an actual or perceived conflict of interest, the member should not be able to hear cases until that outside impugned matter is removed.

Should members be prevented from appearing as a representative or an expert witness in matters in the tribunal while they are members or for a period after their term as member concludes?

Yes

Please expand on your response:

1. Upon conclusion of the member's statutory appointment, the relevant person should be prohibited from appearing before the new body as an advocate for a period of 12 months.

2. There is, at the very least, a perceived conflict of interest if a sitting member were to appear before the decision-making body at which they are employed.

Performance management and removal of members

How should the legislation empower the new body to manage and respond to issues relating to member performance and conduct?

Response:

1. Annual review of a member's performance. Close consideration of the following matters:

a. Number of decisions on reserve.

b. Number of decisions overturned on appeal.

c. Number of decisions published that year.

d. Average period for publication of decision.

e. Any other relevant matter.

2. The President of the new body should have the power, at first instance, to provide professional counselling to the impugned member who has engaged in adverse conduct. If the President considers the conduct to be very serious, the President should be able to recommend the termination of the member's appointment to the Commonwealth Attorney-General.

What are the appropriate grounds, thresholds and process for suspending or terminating the appointment of a member? Who should be responsible for suspending or terminating the appointments of members?

Enter your response here:

1. Grounds for suspending or terminating the appointment of a member should include where the member has engaged in professional misconduct (guided by analogous principles that apply to lawyers in professional practice).

2. The Commonwealth Attorney-General should have the power to either suspend or terminate the appointment of members (on the recommendation of the President after a full investigation has been undertaken with the usual safeguards of procedural fairness having application).

3. Grounds for suspension may also include unsatisfactory professional conduct (guided by analogous principles that apply to lawyers in professional practice).

Making an application

How can the new body ensure that application methods and processes are accessible to all those seeking review?

Enter your response here:

1. An application for a review of a decision must be made in writing or by making an oral application in person at, or by telephone to, a Registry of the new body.

2. By allowing applicants to make an application in either writing or orally, this provides greater flexibility consistent with the objectives of administrative review.

a. What should be the requirements to lodge an application? Should a statement of reasons by the applicant be required? Should different requirements apply to particular types of applications or to particular cohorts?:

1. An application for a review of a decision:

a. must be made either in writing or by making an oral application in person at, or by telephone to, a Registry;

b. must be accompanied by any prescribed fee that is payable within six weeks of lodgment of the application (subject to an extension or exemption being granted);

c. may contain a statement of the reasons for the application; and

d. may contain a copy of the decision and reasons for the decision under review.

2. The preceding proposal is a watered-down version of s 29(1) of the Administrative Appeals Tribunal Act 1975 (Cth) (the AAT Act).

3. There should not be a mandatory requirement for a statement of reasons to be lodged with an application to the new body. First, the purpose behind such a requirement is usually achieved when the parties are required to lodge a statement of facts, issues and contentions with the decision-making body. Second, the administrative review body considers appeals in a de novo setting. In that context, a mandatory obligation for an applicant to outline the reasons why the decision under review is wrong is not necessarily useful in the review process.

4. The decision of Miller v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCA 489 demonstrates how the current obligation in s 29(1)(c) of the AAT Act brings about an unreasonable and unfair outcome. There, the non-citizen failed to lodge a statement of the reasons for the application when the application was lodged with the Tribunal. Non-compliance with the statutory obligation of s 29(1)(c) of the AAT Act caused no prejudice to either the Tribunal or the Minister. However, the application was considered to be invalid given the strict mandatory nature of the requirements reflected in s 29(1) of the AAT Act. The submitter appeared, pro bono, for Mr. Miller in all proceedings before the Federal Court of Australia. As these proceedings are currently before the High Court of Australia, it would be inappropriate to comment further on the Miller litigation.

b. What should be the time limits for making an application? Should these be consistent across all matters? In what circumstances should the new body be able to grant an extension of time or set the date of effect of a decision?:

1. The time limits for making an application should be 35 days from the date of the decision.

2. The time limits should be consistent across all subject matter areas.

3. The new body should be able to grant an extension of time in relation to all applications filed. The test should be whether it is in the interests of justice for an extension to be granted. As to that test, the new body can draw upon the rich jurisprudence in the Federal Court of Australia on principles relevant to an extension of time.

c. Are application fees at an appropriate level? Are current criteria for reduced fees or fee exemptions appropriate? Should the rules relating to fees and fee refunds be harmonised? What other protocols might apply? For example, should application fees be refunded to successful applicants and how may success be judged?:

1. Generally, application fees are at an appropriate level (subject to the below).

2. We are told that the application fees for migration visa decisions is $3153.00. There is no sound basis to charge higher application fees in migration visa decision than other subject matter areas. It is a form of discrimination to non-citizens that is unfair and unjustified.

3. The rules relating to application fees and fee refunds should be harmonised. The same application fee should be set for all applications. The same universal fee reduction and fee exemption rules should apply to all applications. It is not clear to the submitter why there is such a disparity in application fees depending on the kind of case lodged.

4. There should be no refund on application fees.

What should be the consequences of failing to comply with application requirements, including non-payment of fees, and what powers does the new body need to manage non-compliant applications effectively?

Enter your response here:

1. The consequences of non-compliance with application requirements should not lead to direct invalidity of an application.

2. In the event of non-compliance, the new body should have the power to call a direction hearing and order the applicant to remedy the non-compliance by a date set by the member.

3. If the party fails to comply with an order made by the member, the member should have the power to dismiss the application.

What methods of lodgement should be permitted? To what extent should lodgement methods be harmonised for all applications?

Enter your response here:

1. Written and oral applications. This proposal provides a greater level of flexibility required of an administrative review body in modern Australia.

2. Lodgement methods should be harmonised for all applications.

Which applicants or categories of applicant should be able to lodge an application orally (noting the workload/resources involved and the need for clear criteria)?

Enter your response here:

1. All applicants should be able to lodge an application orally.

2. Applicants should be encouraged lodge an application in writing unless there are good reasons.

Case management, directions and conferencing

What powers should the new body have to use case conferencing (or other forms of managing a matter) for the effective and efficient management and resolution of cases? Are there matters for which case conferencing is not appropriate?

Enter your response here:

1. Case conferencing should be a mandatory requirement in all applications lodged with the new body.

2. Decision-makers who conduct case conferences should have the power to make directions for the progression of the application to hearing. This includes, by way of example, the following:

a. orders for the mode of hearing;

b. dates for filing and service of a statement of facts, issues and contentions and evidence;

c. date for filing and service of reply evidence;

d. date(s) for a contested hearing;

e. orders in relation to subpoenas; and

f. orders in relation to provision of an interpreter.

What should be the role and functions of conference registrars (or equivalent) in the new body? Should conference registrars have particular skills or training, for example legal qualifications or skills in dispute resolution?

Enter your response here:

1. Authorise non-members of the new body (such as conference registrars) to decide consent orders.

2. Conference registrars should be required to be legally qualified.

3. Those conference registrars participating in alternative dispute resolution (ADR) processes should also have professional training / experience in ADR processes.

What directions making powers should be available for the new body? Should these powers be available to the new body for all matters? Who should be able to exercise them?

Enter your response here:

1. Decision-makers who conduct case conferences should have the power to make directions for the progression of the application to hearing. This includes, by way of example, the following:

a. orders for the mode of hearing;

b. dates for filing and service of a statement of facts, issues and contentions and evidence;

c. date for filing and service of reply evidence;

d. date(s) for a contested hearing;

e. orders in relation to subpoenas; and

f. orders in relation to provision of an interpreter.

2. Both statutory members and conference registrars should have the power to make directions. The provision of directions is a fairly simple process and will allow members to spend more time on resolving substantive applications before the new body.

3. The powers to make directions should be especially broad, to capture the range of issues that may occur at a direction hearing.

What powers should the new body have to address non-compliance with directions?

Enter your response here:

1. Stay of proceedings until non-compliance has been remedied.

2. Dismissal of proceedings for non-compliance.

3. In exceptional circumstances, a costs order for non-compliance.

What other interlocutory processes and proceedings should be available in the new body?

Enter your response here:

1. An application for an extension of time to apply for a review.

2. An application to be joined as a party to the proceedings.

3. Orders that relate to confidentiality.

4. Stay orders of a decision.

5. An application to dismiss a matter.

What powers or procedures should be available to expedite the resolution of matters? Are there specific types of matter which could benefit from expedited review processes?

Enter your response here:

1. The power to dispense with a hearing and determine the issues ‘on the papers’. This is more likely to be appropriate where issues of credit of relevant witnesses is not in issue.

2. The power to set benchmarks around the length of time that matters should take to progress through a review process or set time limits around the provision of new information (while being mindful of the need to afford procedural fairness).

3. The kind of matters appropriate for expedited review include applicants who are in immigration detention, social security cases and other matters where the rights and liberties of a person are being considerably curtailed.

Information provision and protection

What documents should respondents be required to provide the new body in relation to the original decision, and in what timeframes? Should these provisions be standardised across all matters?

Please enter your response:

1. Respondents should be required to produce all documents that were before the original decision-maker in making the impugned decision.

2. Respondents should have 14 days to produce a copy of the applicant's file to the new review body.

3. These provisions should be standardised across all matters with a discretion to extend the timeframe as deemed appropriate by the new body.

What powers should the new body have to compel departments, agencies, applicants, or third parties to provide documents, information or evidence? Should these powers be available across all matters?

Please enter your response:

1. The power to summon a person to appear before it to give evidence or produce any document or other thing specified in the summons.

2. The powers should be available across all matters that come before the new body.

What documents and information should the Tribunal share or not share with applicants?

Enter your response here:

1. All documents considered by the original decision-maker should be shared with the new review body subject to 'protected information'.

2. Protected information includes information:

a. whose disclosure would, in the Minister's opinion, be contrary to the national interest because it would:

i. prejudice the security, defence or international relations of Australia; or

ii. involve the disclosure of deliberations or decisions of the Cabinet or of a committee of the Cabinet; or

b. whose disclosure would, in the Minister's opinion, be contrary to the public interest for a reason which could form the basis of a claim by the Crown in right of the Commonwealth in judicial proceedings; or

c. whose disclosure would found an action by a person, other than the Commonwealth, for breach of confidence;

and includes any document containing, or any record of, such information or matter.

By what criteria should the new body allow private hearings or make non disclosure/non publication orders?

Enter your response here:

1. In considering whether to hold a private hearing or make non-disclosure / non-publication orders, the decision-maker should consider the following matters:

a. the principle that hearings should be held in public;

b. whether holding a public hearing would threaten national security, have adverse consequences for vulnerable individuals, or deter an applicant from seeking external review of a decision if the result is to have their identity and personal details made available to the general public;

c. any other relevant matter.

Should all matters involving sensitive national security information have a common set of protections and processes? What should those protections be?

Yes

Please expand on your response:

1. The protections and procedures relating to national security information should be consistent when the new body is reviewing decisions involving national security information and should not be discretionary.

Resolving a matter

What types of dispute resolution should be available in the new body?

Enter your response here:

1. Conciliation, mediation, case appraisal and neutral evaluation should be available.

2. The new body should be free to apply ADR processes where it is appropriate.

Should dispute resolution be available across all types of matters? Are there matters where it may be less appropriate? Should some methods of dispute resolution only be made available for particular types of matters?

Enter your response here:

1. Dispute resolution should be available across all types of matters (although not a mandatory requirement).

2. Dispute resolution is less appropriate in complex migration law cases, security cases and matters where considerable expert evidence is required.

What additional powers or procedures should be introduced to increase the accessibility and availability of dispute resolution in the new body? Who should be able to refer a matter to dispute resolution?

Enter your response here:

1. The presiding member of a case should be able to refer a matter to dispute resolution.

2. Dispute resolution should be a discretionary requirement.

What powers should the new body have to resolve a matter before hearing? Which of these powers could be conferred on non-members? Should these powers be standardised across all matters?

Enter your response here:

1. Dismiss an application without proceeding to review if it is satisfied that the decision is not reviewable.

2. The new body can make a decision in accordance with an agreement reached by the parties.

3. If, in the course of alternative dispute resolution, agreement is reached by the parties, the new body can make a decision in accordance with those terms.

4. Where all parties consent, the new body may dismiss the application.

5. All matters by consent could be dealt with non-members.

6. The preceding powers should be standardised across all matters.

What powers should the new body have to manage applications that are frivolous or vexatious?

Enter your response here:

1. The new body may dismiss an application that is frivolous, vexatious, misconceived or lacking in substance, has no reasonable prospect of success or is otherwise an abuse of the process.

2. Only a statutory member should be able to determine frivolous or vexatious applications.

In what circumstances should the new body be able to dispense with a hearing?

Enter your response here:

1. In circumstances where the parties consent.

2. In circumstances where the member hearing the matter is satisfied that the issues for determination can be adequately determined in the absence of the parties.

3. Where there is no contradictor, the new body should have the power to decide a matter on the papers if it considers it should decide the review in the applicant's favour on the basis of the material before it.

How should hearings be conducted to ensure that they are accessible, informal, economical, proportionate, just and quick?

Enter your response here:

1. By default, hearings should be by telephone or video. This will save considerable costs from parties and witnesses from physically attending hearings.

2. Parties can seek an order for a face-to-face hearing. For example, where serious questions of credibility are at play, it may be more appropriate for the evidence to be adduced in physical form in the witness box.

3. It should not be assumed that all proceedings before the new body will be informal and quick. For example, character cases before the Tribunal often require resolution of very complex factual questions where the implications of the decision can be life changing. Such cases are heard with a contradictor and often require considerable time to make the correct or preferable decision (inclusive of considerable material to digest in fixed time periods).

Decisions and appeals

What should be the requirements and timeframes for issuing oral and written reasons for decision in the new body?

Enter your response here:

1. There should be an expectation that decision-makers will publish their decision and provide a statement of reasons for the decision within 90 days of the final hearing date.

2. There should not be a mandatory requirement imposing a time limit for publication of a decision. Naturally, the President of the new body and Division Heads should be given power to counsel members who continuously publish decisions outside the prescribed 90-day time period.

How can the new body achieve quality, consistency, accessibility and simplicity in explaining the reasons for a decision?

Enter your response here:

1. Appointing members on merit.

2. Avoiding, at all costs, political appointments.

3. Ensuring all members are legally qualified.

4. Ensuring members are appropriately assisted by administrative staff.

5. Ensuring all members are provided with appropriate training on how to publish a written decision with reasons.

6. A standarised template could be used, which includes the following headings:

a. Introduction.

b. Facts.

c. Applicable Law and Policy.

d. Consideration / Discussion.

e. Conclusion and Orders.

7. A broad template, as suggested above, could be tailored to the various matters that come before the new body.

8. Ensuring poor performing members are not reappointed.

Are there ways to streamline appeal processes and pathways to reduce the overall duration of a matter?

Please enter your response:

1. Introducing an online system whereby parties can indicate available dates for hearing early in the proceedings. Based on that system, the new body can issue de facto directions without the need to hold a direction hearing.

2. Introducing standarised directions in the various divisions of the new body.

3. Requiring parties to clearly particularise the issues that are in dispute between the parties.

4. Requiring parties to liaise before a contested hearing to make clear what witnesses are required for cross-examination.

What should be the timeframes for lodging an appeal from a decision of the new body? Should this date from the receipt of a decision, or the receipt of written reasons for decision?

Enter your response here:

1. The timeframe for lodging an appeal from a decision of the new body should be 35 days.

2. The time to appeal should start from when the aggrieved party receives a copy of the written reasons for decision. Naturally enough, without provision of reasons, it is very difficult to determine whether the member has made a decision beyond power.

When and how should the new body be able to refer a question of law to the Federal Court of Australia? Are there other ways for the new body to seek clarity on unsettled matters of law and statutory interpretation (such as guidance decisions or decisions by an appeal panel within the new body) and how should these be used?

Enter your response here:

1. A matter could be referred to the Federal Court of Australia by consent of the parties to address a question of law.

2. The President of the new body can refer a matter to the Federal Court of Australia to address a question of law where it is in the interests of justice to do so.

3. The submitter is not persuaded that an appeal panel should publish guidance decisions or address hypothetical questions. The normal appeal process should take place.

What processes should be in place to ensure the new body refers questions of law to the Federal Court of Australia in appropriate circumstances?

Enter your response here:

1. A Practice Note which deals with the following matters:

a. the basis upon which a matter may be referred to the Federal Court of Australia; and

b. the procedure for making an application to have a question of law referred.

2. A clear provision in the legislation that only the President has the power to refer a matter to the Federal Court of Australia where it is not by consent of the parties.

Should a second, more formal tier of review be available in the new body, either for specific types of matter or across all matters?

No

No

Please expand on your response:

1. By the time the matter is dealt with on review in the Tribunal, the applicant has had the matter considered twice in a merits review context (once before the original decision-maker and once before the statutory member of the review body).

2. Once the matter is resolved in the Tribunal once, any further appeal should be to the Federal Court of Australia on a question of law or pleading by reference to jurisdictional error.

3. Introduction of an appeal panel in the new body is neither desirable nor necessarily in the interests of justice. For example, a party may be forced into further proceedings before a second tier of review without a proper basis. A second tier of review also, self-evidently, prolongs the resolution of a matter.

4. Providing second tier review by multi-member panels could also be considered impractical from a resourcing perspective

Response:

1. Strict questions of law arising from the first decision.

2. However, the submitter is not persuaded a second tier of review should operate in the new body. One would need to seriously consider how such a process would promote the objectives of the new body.

No

Please expand on your response:

1. For reasons already given, there simply should not be a second tier of review.

2. Any serious questions of law, should they need to be resolved, should occur in the Federal Court of Australia in the exercise of judicial power.

3. The danger of a second tier of review is to introduce a decision-making body to decide questions of law that really are the domain of the federal judiciary.

Supporting parties with their matter

Should there be a requirement in the new body to seek leave to appear with representation?

No

Enter your response here:

1. The imposition of a leave requirement to appear with legal representation would be absurd. The reality is that the cases that come before the Tribunal are complex, intricate and important. Given that context, it is paramount that parties have a right to legal representation.

Should there be requirement or a code of conduct for representatives to ensure representatives act in the best interests of a party? How should this be enforced?

No

Please expand on your response:

1. Solicitors and barristers are already bound by codes of conduct as professionals. They are also bound by common law obligations. Given that context, there is no necessity for lawyers to be bound by an additional code of conduct. With respect, such a proposal is misplaced.

What services would assist parties to fully participate in processes under the new body and improve the user experience? Which of these services should be provided by departments and agencies, by the new body and by other organisations?

Enter your response here:

1. An interpreter service funded by the new body.

2. Those applicants who cannot afford legal representation should be appointed a lawyer. The appointment should be funded by the Commonwealth Government. Denial of legal representation is often a denial of justice.

How can the new body (or ancillary services) enhance access for vulnerable applicants?

Enter your response here:

1. Guaranteed appointment of a lawyer funded by the Commonwealth Government.

2. An interpreter service funded by the new body.

3. Ensuring only qualified members are appointed. Those members must hold a law degree or an equivalent legal diploma.

4. All members must undertake trauma training to fully appreciate witnesses who have a complex background.

How can the new body protect the safety and interests of applicants who have experienced or are at risk of trauma or abuse? For example, what special processes may be needed in relation to information protection, participation in dispute resolution and hearings for at-risk applicants?

Enter your response here:

1. All members must undertake trauma training to fully appreciate witnesses who have a complex background.

2. Where needed, cross-examination of vulnerable applicants should take place by video hearing (much like how domestic violence and sexual assault victims given evidence by audio video link in criminal law proceedings).

3. Applicants who have experienced or are at risk of trauma or abuse should be offered the opportunity to give their evidence in private.

4. Counselling services should be offered for vulnerable applicants.

5. In dispute resolution processes, a vulnerable applicant should be assisted by a lawyer. This is paramount to protect an applicant's interests.

Should the legislation place an obligation on the new body to promote accessibility for all users?

Yes

Please expand on your response:

1. Decision-makers should have an obligation to advance the statutory objectives of the new body. That is, when making decisions, members should closely have regard to the statutory objectives of the legislation.

2. Current jurisprudence indicates that the statutory obligations of the Administrative Appeals Tribunal are aspirational: see Fard v Department of Immigration and Border Protection [2016] FCA 417 at [80].

3. It should be made clear that the statutory objectives of the new body are more than aspirational; they are binding principles relevant in the exercise of a discretionary power.

How can the new body ensure that a party with a disability is supported to participate in proceedings in their own capacity?

Enter your response here:

1. A disability support worker should be able to assist a disabled party as deemed appropriate by the new body.

2. There should be flexibility in the location and mode of hearings to cater for a disabled party.

3. As far as possible, the new body should ensure a disabled party has access to a lawyer in the proceedings. This is paramount to protect the interests of a disabled party.

4. The new body should have regular meetings with relevant stakeholders (i.e. disabled organisations) to gain a greater understanding into the needs of disabled persons.

5. Published guidelines should be made to ensure members understand the special needs of disabled persons. Additionally, members should undertake mandatory training on the needs of disabled persons.

Should the new body be able to appoint a litigation guardian for a party where necessary? If so, what should the requirements and process be for the appointment of a litigation guardian?

Yes

Please expand on your response:

1. The new body should have the power to appoint a litigation guardian as follows:

a. at the request of a party, or

b. on the new body's own motion,

in the interests of justice.

2. Where an appropriate person cannot be found, the new body may seek appointment of a litigation guardian from the Commonwealth Attorney-General.

Other matters

Do you have any other suggestions for the design and function of a new administrative review body?

Enter your response here:

1. There should be a greater presence of the new body in the suburbs. For example, in Sydney, the Administrative Appeals Tribunal (Tribunal) is based in the Sydney CBD. Yet, many of the users reside in various parts of Sydney. Justice should not only be done but seen to be done.

2. For example, the new body should have a presence in South Western Sydney (SWS). Many users of the Tribunal reside in SWS. The Villawood Immigration Detention Centre (the VIDC) is based in SWS. Having a decision-making body in close proximity to the VIDC makes sense not only from an economic and practical perspective but can inspire greater confidence in users that a decision-making body has a permanent presence in the area.

3. There should be a permanent legal registry for appointment of Australian solicitors and barristers to provide legal assistance to applicants who cannot afford legally representation. The legal registry should be funded by the Commonwealth. It should be recalled that the new body will be administrating justice and the business of the new body deals with very serious matters.